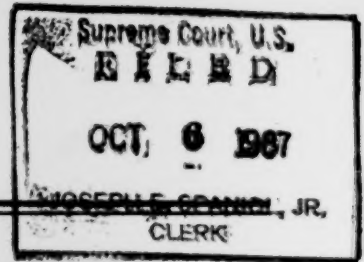


87 - 5 61



No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

— against —

GLOBE TANKERS, GLOBE TRANSPORT AND
TRADING CO., LTD., GAMMA SHIPPING, INC. and
GLOBE TANKER SERVICES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Second Circuit, in disregard of *Anderson v. Bessemer City*, 470 U.S. 564 (1985), exceed its authority under Fed.R.Civ.P. 52(a) by holding that the trial court erred in using shoreside measurements to determine tanker owners' liability for cargo loss, although the record showed and the trial court found that
 - a) High precision shoreside measuring gauges accurately quantified amount of cargo discharged at the legal delivery point.
 - b) On board draft survey estimates were comparatively crude, unreliable and of questionable validity.
 - c) There was no leakage, diversion or loss of cargo between the ocean tanker and shoretank, and
 - d) Neither the contract of carriage nor the governing statute required use of on board measurements at discharge.
2. Did the court of appeals breach the rules of judicial construction by treating a factual issue as a question of law, thereby creating a rule which favors symmetry over accuracy to the detriment of holders of negotiable bills of lading.

PARTIES

The parties to this proceeding are petitioner, Insurance Company of North America, and respondents, The Globe Tankers, Globe Transport and Trading Company, Ltd., Gamma Shipping Co., Inc., and Globe Tankers Services, Inc.,

(Insurance Company of North America is a Pennsylvania corporation and an affiliate of the CIGNA Corporation, and brings this action as subrogee of Namolco A.G. and International Molasses Co., Ltd.)

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Motley, Ch. J.) is reported at 638 F. Supp. 1413 and is reproduced at page A-8 of the Appendix. The Second Circuit opinion is reported at 820 F. 2d 546 and is reproduced at page A-1 of the Appendix. The denial of plaintiff's petition for rehearing dated July 9, 1987 is not reported but is reproduced at page A-30 of the Appendix.

JURISDICTION

The Second Circuit opinion, of which review is sought, was decided and entered on June 2, 1987. Plaintiff filed a timely petition for rehearing and rehearing *en banc* which was denied on July 9, 1987. This petition was filed within ninety days of that date and the court's jurisdiction is invoked under 28 USC 1254 (1).

STATUTE AND RULE INVOLVED

The shipment which is the subject of this case was carried pursuant to the United States Carriage of Goods by Sea Act, 46 U.S.C. 1300 *et. seq.* (1936), which implements an international treaty, the "International Convention for the Unification of Certain Rules Relating to (Ocean) Bills of Lading (The Hague Rules)" June 29, 1937, 51 Stat. 233, T.S. 931, 120 L.N.T.S.

Rule 52 (a) Federal Rules of Civil Procedure provides in pertinent part:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purpose of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

STATEMENT OF THE CASE

Petitioner brought this action under the Carriage of Goods by Sea Act, ("COGSA"), 46 U.S.C. Section 1300 *et. seq.* in the United States District Court for the Southern District of New York pursuant to that Court's admiralty jurisdiction, 28 U.S.C. 1333 and 1291.

The cause of action arose from the partial shortage to a shipment of bulk liquid cargo carried aboard the S/S Globe Nova, a flag of convenience ocean tanker owned and operated by defendants. Defendants issued two negotiable bills of lading which represented that 18,952 metric tons of cargo were received aboard the S/S Globe Nova at the ports of loading. Petitioner's subrogor, the CIF purchaser, paid for this amount of cargo when the bills of lading were presented under a letter of credit to designated banks.

After a three week ocean voyage, the tanker discharged at the destination ports, where calculations based on precision shoreside gauges, called pneumercators, indicated that there was a shortage of 253 metric tons of cargo. On completion of unloading, notice of claim for this shortage was presented by the receiver of the cargo to defendants' agents, who were present during discharge.

At a non-jury trial the district judge heard the live testimony of a fact witness who attended to the discharge of the cargo at issue. The witness had performed the calculations which determined that there was a 253 metric ton shortage, as well as the back-up draft survey estimates which were taken by viewing painted marks on the hull of the vessel to approximate the depth of the vessel in the water before and after discharge.

In addition to this live testimony, plaintiff presented evidence consisting of business records relating to the purchase, receipt, and measurement of the cargo as well as the deposition testimony of a director of the company which purchased the cargo. Defendants did not present a witness, and did not offer evidence

regarding the seaworthiness of the vessel, the eventfulness of the ocean voyage, or any evidence in rebuttal.

On May 19, 1986 the district court issued a detailed thirty page decision setting forth findings of fact and conclusions of law. The trial judge found that the calculations based on the high precision shoreside pneumercator gauges accurately reflected the quantity of cargo discharged by defendants as of the legal delivery point, i.e., the tanker's permanent hose connection or manifold. The trial court also found that the discharge draft survey estimates, on which defendants relied, were inaccurate, relatively crude in method, and unreliable. Accordingly, judgment was awarded to plaintiff.

Defendants appealed. On June 2, 1987 the Court of Appeals for the Second Circuit reversed on the stated grounds that the district court should have used the "relatively imprecise" draft survey estimates to determine the quantity of cargo delivered at destination, rather than the calculations based on the "high precision measuring devices" called pneumercators. The court of appeals decision did not mention the trial court's factual findings.

A timely petition for rehearing and rehearing *en banc* was filed by plaintiff. It was denied on July 9, 1987 and this petition was filed within ninety days of that date.

REASONS FOR GRANTING THE WRIT

1) CERTIORARI SHOULD BE GRANTED TO REVIEW THE SECOND CIRCUIT'S CONTINUED PRACTICE OF DISREGARDING THE TRIAL COURT'S FINDINGS OF FACTS

The court of appeals decision in this case is yet another instance of the Second Circuit's practice of exceeding its authority under Rule 52 of the Federal Rules of Civil Procedure by disregarding the trial court's findings of facts. This latest breach of the most fundamental rule of judicial construction was committed despite the recent directives of this court in *Anderson v. Bessemer City*, 470 U.S. 564, 573-81 (1985).

The issue to be decided by the district court in this case had to do with the factual question of the quantity of cargo delivered by defendants at the ports of discharge. At the outset the trial court made the following findings as to the amount of cargo defendants represented in the bills of lading as loaded aboard the vessel:

After the loading of the cargo on the "Globe Nova" and the issuance of the bills of lading, the bills of lading were presented to the banks. Payment was then made under the letter of credit in reliance on the total quantity of 18,952.256 metric tons as stated by the carrier in the two bills of lading. Accordingly. . . Namolco paid 100 % of the invoice price for 18,952.256 metric tons of molasses.

(A-28)

The facts relating to the bills of lading were not contested at trial by defendants who themselves proposed as a finding of fact that the purchaser relied on the bill of lading quantities.¹

¹ It is hornbook law that an ocean carrier is estopped from contesting its quantity representations in a bill of lading where there is reliance by the purchaser on the bills of lading. *Berisford Metal Corp. v. S/S SALVADOR*, 779 F. 2d 841 (2d Cir. 1985). This estoppel would be in effect as to either quantity or method of quantification.

Accordingly, the only contested issue to be decided by the trial court was the factual question as to which of two discharge measurements (draft estimates or pneumercator calculations) accurately reflected the quantity of cargo discharged by defendants at the legal delivery point, i.e. the vessel's permanent hose connection, also called the manifold. (A-22)

The fact witness responsible for both measurement calculations testified at trial that the pneumercator measurements were more accurate, and that the draft survey readings were unreliable rough estimates.² Having heard this testimony, the trial court made the following findings of fact:

...[P]neumercator measurement of large quantities of molasses is far more accurate than measurement accomplished by the older and less technically sophisticated draft survey method (A-25)

* * *

...[T]he pneumercator figures are a more reliable reflection than the draft survey figures of the amount of cargo actually discharged from the Globe Nova. (A-25)

* * *

Plaintiff has shown a discrepancy between the amounts recorded on the bills of lading and the amount of cargo delivered as measured by the shoretank pneumercator readings which the court has decided to give the truest indication of actual outturn. (A-19)

* * *

² The record indicates the draft estimates showed a 70 metric ton discrepancy between the two discharge ports, a 100 metric ton overage still aboard the ship's after discharge, and a 17 metric ton shortfall between final load ports and final discharge ports.

In this case the court has determined that it is the shoretank pneumericator figures, rather than the on-board draft survey figures prior to discharge which best reflect the amount of cargo actually passing through the ship's manifold at Felixstowe and Hull. (A-24)

* * *

The outturn quantity of 18,699 metric tons . . . accurately reflects the quantity of molasses delivered by defendants through the permanent hose connections of the S/S Globe Nova. (A-13)

* * *

. . . [T]he court having found that in this case plaintiff's shoretank figures are a more accurate indication of the amount of cargo discharged from the Globe Nova than the on-board draft survey figures, plaintiff has clearly established its prima facie case under COGSA. (A-26)

These findings by the district court were based on subsidiary findings, that "the shoretank pneumericators . . . were well maintained and in good working order" (A-25); "no cargo loss occurred after the molasses had passed from the ship on its way though the hose connections to the shore" (A-25); "there was no leakage or spillage from the lines that led from the vessel to the . . . receiving tanks" (A-12); "all of the cargo which passed the vessel's permanent hose connection was received in the shore tanks" (A-12); the pneumericator readings "did take into account the molasses in the pipeline leading from the Globe Nova to the storage tanks" (A-13); and "there was no cargo loss between ship-side and shore or in the shoretanks." (A-25)

The court of appeals did not contest the correctness of these findings. Indeed it could not because the record is void of any evidence to controvert the district court's findings as to the accuracy of the high precision measurements on which the claim was based. The court of appeals simply ignored the aforementioned findings of fact and held that the trial court should have

used the “relatively imprecise” draft survey estimates to determine the quantity of cargo discharged. In essence the Second Circuit performed a judicial sleight of hand by simply ignoring the trial court’s findings rather than attempting to determine them to be clearly erroneous. However, the result is the same because the court of appeals supplanted the trial court’s findings with its own holding, thereby imposing its version of the facts on the parties.

This is clearly a breach of the teachings of *Anderson v. Bessemer City*, 470 U.S. 564 (1985), where the deference to be afforded the trier of fact was stated as follows:

If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.* (Emphasis added)

Id. at 574.

Herein, there were two, and only two, possible answers to the factual question of how much cargo was delivered by defendants — either the pneumericator calculations or the draft survey estimates were correct. Chief Judge Motley, having heard the testimony of a witness who attended at the time of discharge, both on the ship and at the shoreside, chose the pneumericator calculations as most accurate.³ Based on the rule of *Bessemer*

³ Neither COGSA nor the charter party required use of the same measurement technique at loading and discharge or use of on-board measurements at discharge. COGSA only requires proof of a *prima facie* case, i.e., that the quantity delivered is less than the quantity in the negotiable bill of lading. *Amerada Hess v. S/S Phillips Oklahoma*, 558 F. Supp. 1164, 1167 (SDNY 1983), *Spencer Kellog v. S/S MORMACSEA*, 703 F. 2d 44, 46 (2 Cir. 1983). The charter party merely says that “risk” of loss passes at the permanent hose connection. (A-10) The trial court found that plaintiff’s pneumericators established the discharge quantity at the permanent hose connection, and that this quantity was 253 metric tons less than the quantities represented by the carrier in the negotiable bills of lading. (A-13, 24, 22, 26)

City, and its progeny, the Second Circuit's reversal of the trial court on the grounds that it should have relied on the draft surveys is a classic example of overreaching by a court of appeals. This disregard of Rule 52 F.R.C.P. would warrant reversal even if it were an isolated incident. Since it is only the latest in a series of breaches by the Second Circuit, as recognized by this Court in *Anderson v. Bessemer City*, there is an urgent need for the court to review this matter and to correct the habitual abuse by the Second Circuit of the provisions of Rule 52 F.R.C.P. and the dictates of this Court.

2) DID THE COURT OF APPEALS ERR IN TREATING A FACTUAL ISSUE AS A QUESTION OF LAW, THEREBY CREATING A PRECEDENT WHICH FAVORS SYMMETRY OVER ACCURACY AND TRUTH TO THE DETRIMENT OF THE RIGHTS OF HOLDERS OF NEGOTIABLE BILL OF LADING.

The court of appeals breached the rules of judicial construction by treating a factual issue, i.e., the determination of the quantity of cargo delivered, as a question of law. Not only did the Second Circuit overlook the purely factual nature of the dispute below, it ignored the factual distinctions in the cases it relied on for the questionable proposition that on-board discharge measurements must be used even where other measurements are proven to be more accurate.

The court of appeals relied on *dictum* from a series of cases wherein the stated reasons for the ruling favoring use of on-board measurements at discharge was the failure of those cargo plaintiffs to prove the accuracy of the shore-tank measurement and

its relationship to the vessel.* The record in this case is completely different from those decisions. Here, the pneumatic measurements were proven to accurately reflect the quantity of molasses discharged by defendants at the legal delivery point. None of the COGSA cases relied on by the court of appeals presented such proof. The true thrust of that line of decisions is that if those plaintiffs had proven what petitioner proved below, use of the shoretank discharge measurements would have been allowed. See e.g. *Kerr McGee Refining Corp. v. M/V La Libertad*, 529 F. Supp. 78, 84 (SDNY 1981) ("If plaintiff had established that all of the cargo was placed in shoretanks, more accurate readings might have been made").

By overlooking the factual nature of the disputes in the cited cases and the case at bar, the Second Circuit has fashioned an erroneous rule of law where none existed.

The anomaly of this rule is that it favors symmetry over accuracy and truth, which is certainly not an enlightened approach. The danger of this rule is obvious when it is realized that the United States has gradually evolved into an importing nation, particularly with respect to bulk liquid products such as crude oil, petroleum and chemicals. Such imported cargoes are usually carried aboard the foreign owned and operated tankers which dominate the shipping lanes. As a result of the rule adopted by the Second Circuit a United States importer, who pays for cargo in reliance on the bills of lading issued by such foreign tanker owners, will not be protected by the rights

* See e.g., *Dow Chemical Co. (U.K.) v. S/S Giovannella D'Amico*, 297 F. Supp. 699, 707-08 (S.D.N.Y. 1969) (plaintiff failed to prove connection between shoretank certificates and cargo on board); *Centerchem Products, Inc. v. A/S Rederiet Odjell*, 1972 A.M.C. 373, 375-76, (E.D. Va. 1971) (broken shoreline caused leakage which court found to be cause of loss); *Northeast Petroleum v. Prairie Grove*, 1977 A.M.C. 2139, 2142-43 (SDNY 1977) (failure to prove amount of cargo passing through permanent hose connection); *Kerr-McGee Refining Corp. v. M/V La Libertad*, 529 F. Supp. 78, 83-85 (SDNY 1981) (plaintiff failed to prove that all of the cargo was placed in shore tanks); *Westco International v. M/V Tide Crown*, 1985 A.M.C. 189, 197 (S.D. Tex 1983) (failure to verify condition of shoreline).

which holders in due course of negotiable bills of lading are guaranteed by law.

As recently stated in *Berisford Metals Corp. v. S/S Salvador*, 779 F. 2d 841, 845 (2 Cir. 1985), *cert. denied*, 106 S. Ct. 2928 (1986), a "negotiable bill of lading is a fundamental and vital pillar of international trade and commerce. . .", and "...has become so universal and necessary a factor in mercantile credits that the law should make good what the Bill of Lading holds out." *Id.* See also *Allied Chemical Int'l. v. Lloyd Brasileiro*, 775 F. 2d 476, 481 (2 Cir. 1985). The rule adopted by the court below requiring a good faith purchaser for value, or a holder of a bill of lading, to be bound by inaccurate on board measurements while accurate measurements show a substantial loss, contravenes the very meaning of a negotiable bill of lading, i.e., that the holder is entitled to receive what is stated on the bill of lading.

Certiorari should be granted to review this area of law before its deleterious effect on commerce is felt by those engaged in commodities trading, international banking and ocean marine insurance.

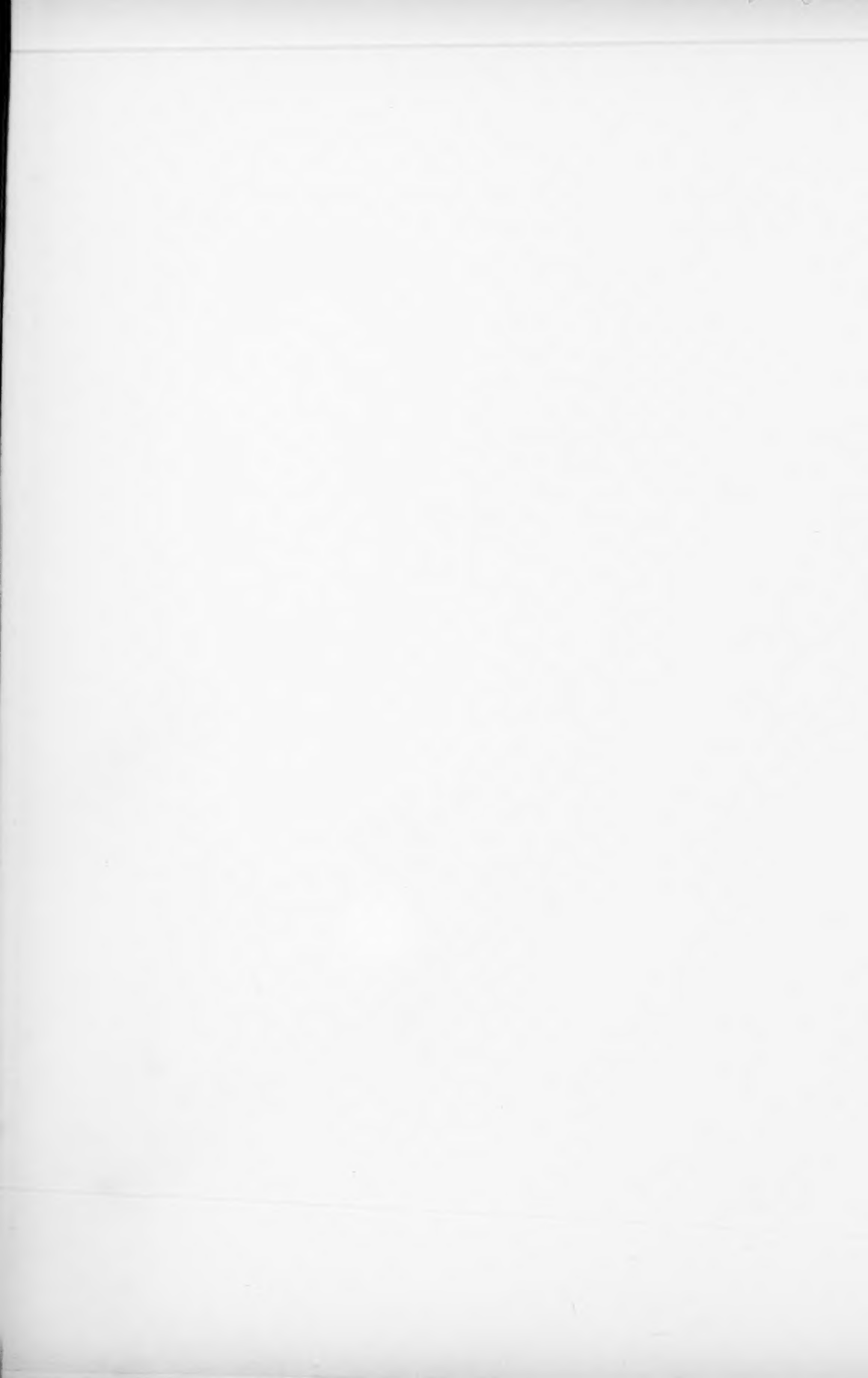
CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully Submitted,

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APPENDIX



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 256 — August Term, 1986

(Argued October 14, 1986

Decided June 2, 1987)

Docket No. 86-7550

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff-Appellee,

— against —

S/S "GLOBE NOVA" her engines, tackle, boilers, etc.,
THE GLOBE TANKERS, GLOBE TRANSPORT AND
TRADING COMPANY LTD., WILLOW GROVE SHIP-
PING COMPANY LTD., GAMMA SHIPPING CO., INC.
and GLOBE TANKER SERVICES, INC.,

Defendants,

THE GLOBE TANKERS, GLOBE TRANSPORT AND
TRADING COMPANY LTD., GAMMA SHIPPING CO.,
INC. and GLOBE TANKER SERVICES INC.,

Defendants-Appellants.

Before: FEINBERG, *Chief Judge*,
WINTER and MAHONEY,
Circuit Judges.

Appeal from a judgment for plaintiff in an action brought under the Carriage of Goods by Sea Act in the Southern District of New York, Constance Baker Motley, Chief Judge. Reversed.

DAVID L. MAZAROLI (Law Offices of
Yorkston W. Grist, P.C.,
New York, New York, of counsel), for
Plaintiff-Appellee
Insurance Company of North America.

HOLLIS M. WALKER, JR. (Constantine
W. Papas, Walker & Corsa, New York, New
York, of counsel), for
Defendants-Appellants
The Globe Tankers, Globe Transport and
Trading Company Ltd., Gamma Shipping
Co., Inc. and Globe Tanker Services Inc.

MAHONEY, Circuit Judge:

Plaintiff-appellee Insurance Company of North America brought this action in the Southern District of New York for damages arising from an alleged shortage in a shipment of molasses. After a bench trial before Chief Judge Constance Baker Motley, judgment was entered for plaintiff. Defendants appealed, and we now reverse.

BACKGROUND

The Insurance Company of North America sues as the subrogee of its insured, Namolco, A.G., the purchaser, and International Molasses, Ltd., the recipient, of the molasses. The defendants, related companies engaged in ocean transport of cargo, are Gamma Shipping Co., Inc., the owner of the S/S Globe Nova; Globe Transport & Trading Company Ltd., the chartered owner of the ship; and Globe Tanker Services Inc., also known as Globe Tankers, its operating manager.¹

¹ Willow Grove Shipping Company Ltd., the charterer of the Globe Nova for the voyage in question, has apparently never been served as a defendant in this action.

On February 3, 1983, a charter party was entered into between Globe Transport and Trading Company Ltd. and Willow Grove Shipping Company Ltd. for the shipment of molasses. On March 29, 1983, the State Trading Corporation of India delivered molasses to the defendants and the Globe Nova at Bombay, India, pursuant to a letter of credit with Namolco, A.G. and several banks. The delivered cargo was weighed on board the Globe Nova by the "draft survey" technique, which compares the depth of the vessel in the water before and after loading to determine the amount of cargo delivered. The measurement indicated that the ship received 15,522.778 metric tons of molasses, and the carrier issued a negotiable on board bill of lading for that amount to the seller.

The Globe Nova then sailed on to Kandla, India, where the State Trading Corporation delivered another 3,429.478 metric tons of molasses, as measured by the draft survey method, for which another negotiable on board bill of lading was issued. The Globe Nova at this juncture had 18,952.256 metric tons of molasses, as measured by the draft surveys and reflected by the bills of lading.

The vessel then sailed to Felixstowe, England, arriving on April 25, 1983, where the receiver of the molasses, International Molasses, Ltd., operated a shore storage facility. Upon the Globe Nova's arrival in Felixstowe, an employee of International Molasses measured the ship's cargo by a draft survey. Approximately half of the ship's cargo was discharged from the ship to the Felixstowe tanks through offshore pipelines. When the process was completed, another draft survey was taken. According to the draft surveys, 9,088.57 metric tons of molasses were out-turned through the ship's permanent hose connection, and thus delivered to the Felixstowe storage facility.

The Globe Nova then travelled to Hull, England, where it delivered molasses to another International Molasses facility. The draft surveys conducted at Hull indicated that 9,846.79 metric tons passed through the permanent hose connection. The draft surveys at the two ports thus showed an insignificant shortage, which the district court held to be nonactionable.

The shore tanks at Felixtowe and Hull, however, were equipped with pneumercators, high precision measuring devices. Those devices are apparently far superior to draft surveys at measuring accurately the amount of molasses transferred to the tanks. According to the pneumercators, 9,074 metric tons were transferred to the tanks at Felixtowe and 9,625 metric tons were transferred to the Hull tanks. Thus the tank gauges showed a total of 18,699 metric tons of molasses, for a shortage of 253 metric tons when compared to original draft survey figures. Plaintiff brought this suit for damages resulting from the shortfall under the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 (1982) ("COGSA"),² and was awarded a judgment of \$48,502.62, with interest, for the non-delivery of 253 metric tons of molasses after a nonjury trial before Chief Judge Motley.

DISCUSSION

Plaintiff establishes a *prima facie* case under COGSA by showing delivery of the cargo in satisfactory condition to the carrier and arrival of less cargo than was delivered. *Spencer Kellogg, Division of Textron, Inc. v. S.S. "Mormacsea"*, 703 F.2d 44, 46 (2d Cir. 1983); *see also Westway Coffee Corp. v. M.V. Netuno*, 675 F.2d 30, 32 (2d Cir. 1982) (as to damaged condition). The burden then shifts to defendant to prove one of the defenses provided in 46 U.S.C. § 1304 (1982). *Westway*, 675 F.2d at 32.

The issue in this case is simply what the proper measure of the outturn is. The parties agree that if the amount delivered was deficient, Globe is liable for the shortage. *See Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841, 847-48 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 2928 (1986). The amount loaded was determined by the draftsurvey method, and the amount thus determined is the only figure available for comparison. The

² Although COGSA applies only to "contracts for carriage of goods by sea to or from ports of the United States in foreign trade," *see* 42 U.S.C. § 1312 (1982), and therefore is not applicable by its terms here, the parties contracted in their charter party (which was incorporated by reference in the bills of lading) to be governed by U.S. law, and thus by COGSA.

alleged shortage was discovered by comparing the draft survey measure with the pneumercator readings. The draft survey measure is a relatively imprecise method, but when compared to another draft survey measure, can be used to determine if cargo has been lost.

Courts generally hold that the same methods of measurement should be used at delivery and offloading, and that offloading measurements should be made on board the vessel. *See, e.g., Unilever/Lever Bros. (PTY) Ltd. v. M/V Stolt Spur*, 583 F. Supp. 139, 142-43 (S.D. Tex. 1984); *Wesco International, Inc. v. M/V Tide Crown*, 1985 A.M.C. 189, 195-97 & n.8 (S.D. Tex. 1983) (use of different modes of measurement would be "comparing apples and oranges"); *Kerr-McGee Refining Corp. v. M/V La Libertad*, 529 F. Supp. 78, 83-85 (S.D.N.Y. 1981); *Northeast Petroleum Corp. v. S.S. Prairie Grove*, 1977 A.M.C. 2139, 2142-43 (S.D.N.Y. 1977) (Pierce, J.); *Esso Nederland v. M.T. Trade Fortitude*, 1977 A.M.C. 2144, 2147 (S.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977); *Centerchem Products, Inc. v. A/S Rederiet Odjell*, 1972 A.M.C. 373, 375-76 (E.D. Va. 1971); *Dow Chemical Co. (U.K.) v. S.S. Giovaneila D'Amico*, 297 F. Supp. 699, 707-08 (S.D.N.Y. 1969); *see also Palmco Inc. v. American President Lines, Ltd.*, 1978 A.M.C. 1715, 1720 (D. Or. 1978) (use of varying methods to determine difference increases inaccuracy, but court used shore tank measures where no measures were made on the ship). *But see Amoco Oil Co. v. M/V Lorenzo Halcoussi*, 1984 A.M.C. 1608, 1612, 1614-15 (E.D. La. 1983) (using shore measures because ship's measures were "admittedly inaccurate").

In these cases, as in the present one, delivery of the cargo was completed at the "vessel's permanent hose connection."³ At that

³ The terms of the February 3, 1983 charter party contained the following provision:

The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of Vessel at the expense of the Vessel, *but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee.*

point, the shipowner's liability ends, the risk of loss shifts, and a plaintiff cannot make out a *prima facie* case under COGSA by showing later measurements. Courts give various reasons for this result, including that it is unfair to require the shipowner to inspect and be responsible for the shore facilities, see *North-east Petroleum Corp.*, 1977 A.M.C. at 2143; *Centerchem Products, Inc.*, 1972 A.M.C. at 375, and that the charter agreement makes the delivery complete at the outturn and evidence of later measurements is thus irrelevant, *Wesco International, Inc.*, 1985 A.M.C. at 196. We agree and find that the district court erred in failing to use the same method for measuring cargo at offloading that was used at delivery.

Plaintiff appears to argue that since draft surveys are less accurate than pneumercator readings, the draft surveys at unloading should be disregarded, and that since the cases cited did not involve draft surveys, they are distinguishable. Plaintiff stops short of arguing that use of draft surveys was itself negligent, and indeed made no showing below to that effect. Nor did it make a showing that the measurements used in the cited cases were more accurate. The distinction is therefore unsupported, and we decline to hold on this record that those who use draft surveys do so at their peril. Cf. *Morton v. Berman Enterprises*, 669 F.2d 89, 91-92 (2d Cir. 1982).

The district court stressed the fact that a bill of lading was issued for the molasses, emphasizing that since bills of lading "are heavily relied upon by buyers in arranging for payment via letters of credit, the importance of holding a carrier to the representations made in a bill of lading should be obvious." COGSA provides, however, that bills of lading are only "prima facie evidence" of their contents, see 46 U.S.C. § 1303(4) (1982). In this case, in any event, the parties do not dispute that the quantity specified in the bills of lading was actually loaded aboard the *Globe Nova*. Therefore, the controversy concerns only whether that same quantity was offloaded, and the reliability of the bills of lading is not directly at issue.

Strong reliance was placed below upon *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841 (2d Cir. 1985), *cert. denied*,

106 S. Ct. 2928 (1986), a case in which this court held a carrier liable for a shortage of seventy (out of a hundred) bundles of tin ingots. There, however, the goods were delivered to the carrier at a shore terminal; the carrier, for its convenience, placed the bundles into four larger containers which were locked and sealed; and no check was made when the containers were loaded on the ship that the bundles were still in the containers, even by weighing the containers (whose weight had been reduced from 111,656 pounds to 32,771 pounds by removal of the seventy bundles). No similar conduct occurred here, and no persuasive reason is advanced for ignoring the normal rule (which had no application in *Berisford Metals*) that the same methods of measurement should be used at delivery and offloading, and that offloading measurements should be made on board the vessel.

The judgment of the district court is therefore reversed and remanded with instructions to enter judgment for the defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INSURANCE COMPANY OF NORTH AMERICA

Plaintiff,

— against —

S/S "GLOBE NOVA," her engines, tackle, boiler, etc., THE
GLOBE TANKERS, GLOBE TRANSPORT AND
TRADING COMPANY LTD., WILLOW GROVE
SHIPPING COMPANY LTD., GAMMA SHIPPING
CO., INC., GLOBE TANKER SERVICES, INC.,

Defendants.

84 Civ. 1928 (CBM)

APPEARANCES:

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MOTLEY, Ch. J.

OPINION

This is an action under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. Section 1300 et seq., for an alleged shortfall in a shipment of molasses from India to the United Kingdom. After a bench trial and consideration of the controlling law as well as of the evidence submitted by the parties, the court finds and concludes that plaintiff has made out a *prima facie* case for relief under COGSA, unrebutted by defendant and that, accordingly, plaintiff is entitled to damages. The court's findings of facts and conclusions of law are as follows:

FACTS

Plaintiff, Insurance Company of North America, is the insurer of the shipment of molasses at issue in this case and brings this suit as subrogee of the insured parties. The insurance coverage was arranged through Namolco, Inc., a Delaware Corporation. The policy included coverage of Namolco, A.G., a Swiss Corporation, and International Molasses, Ltd., an English business entity, both subsidiaries of Namolco, Inc. Namolco A.G. was the FOB purchaser of the cargo and International Molasses, Ltd. was the receiver of the cargo.

Defendants are related companies engaged in ocean transport of cargo. During the period at issue in this action, defendant Gamma Shipping Company, Inc. was the owner of the S/S Globe Nova. Defendant Globe Transport & Trading Company, Ltd. was the vessel's chartered owner. Defendant Globe Tanker Services, Inc., also known as Globe Tankers, was the operating manager of the S/S Globe Nova at all relevant times. Defendant Willow Grove Shipping Company, Ltd., the charterer of the Globe Nova for the voyage in question, has never been served as a defendant in this action.

On March 29, 1983, The State Trading Corporation of India, a seller of molasses, made a delivery of molasses to defendants and the Globe Nova at the port of Bombay, India. This

was done pursuant to a letter of credit arrangement with Namolco, A.G. and various banks. The cargo was weighed on board the Globe Nova by a draft survey technique, a method which compares the depth of the vessel in the water before and after loading. This Bombay draft survey indicated that the ship had received 15,522.778 metric tons of molasses, the same amount that the Indian seller had represented to defendants would be delivered. Defendant carrier at this time issued a negotiable on board bill of lading dated March 29, 1983 for 15,522.778 metric tons of Indian cane molasses of sound and merchantable quality.

From Bombay the Globe Nova sailed to Kandla, India. On April 3, 1983 the same seller, pursuant to the same letter of credit arrangement, delivered a quantity of molasses to the vessel at Kandla. This additional molasses was again weighed on board by a draft survey method. The draft survey here indicated that 3,429.478 metric tons of molasses had been loaded on board. As in Bombay, this was the identical amount as the seller had represented would be delivered to the ship at Kandla. Defendant carrier at this time issued a second negotiable on board bill of lading dated April 3, 1983 for 3,429,478 metric tons of Indian cane molasses of sound and merchantable quality.¹

The cargo was shipped from India to the United Kingdom pursuant to a charter party dated February 3, 1983 between defendant Globe Transport and Trading Company Ltd. as chartered owner of the Globe Nova, and Willow Grove Shipping Company Ltd. Clause Seven of this charter party reads in pertinent part:

The cargo shall be pumped into the vessel at the expense, risk and peril of the Charterer, and shall be pumped out of Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee.

The bills of lading issued by the Globe Nova at Bombay and Kandla both incorporate the terms of the February 3, 1983 charter party between Globe Transport and Trading Company

Ltd. and Willow Grove Shipping Co. Ltd. Besides setting forth the weight of the cargo as loaded on board, among other things the bills of lading state that the cargo is consigned "to order," that the "Freight [is] payable per Charter Party," and that "[t]he contract of carriage evidenced by this bill of lading is between the shipper, consignee and/or owner of the cargo and the owner or demise charterer of the vessel" As per the charter party clause number eight, the freight was due and payable "[n]inety percent prepaid on telegraphic advice of signing Bills of Lading on the intake quality"

The voyage of the *Globe Nova* from Kandla, India to its first discharge port at Felixstowe, England lasted approximately three weeks. Defendants offered no evidence regarding the nature or eventfulness of the *Globe Nova*'s ocean transit. There was also little evidence as to the condition of the vessel other than that it had been built in 1964.

On April 25, 1983 the *Globe Nova* arrived at Felixstowe, England where the receiver of the cargo, International Molasses, Ltd. ("Intermol"), operated a shore facility. Upon the ship's arrival at Felixstowe, an Intermol employee conducted a draft survey of its cargo. Roughly half of the molasses on board was then discharged through offshore pipelines into Intermol's Felixstowe shoretanks located approximately 1250 feet from where the vessel was docked. This discharge lasted about three days. After it was complete another draft survey was taken of the amount of molasses remaining on board.

The vessel proceeded to a second Intermol facility at Hull, England where it arrived on April 27, 1983. Here the remaining molasses cargo on board was measured by draft survey, again by an Intermol employee. This molasses was then discharged into the Intermol shoretanks at Hull located about 1250 feet from the ship's docking point. The Hull discharge activities lasted about six days. Upon completion of this discharge a second draft survey of the ship's contents was made. The combined draft survey results at Felixstowe and Hull indicate with only a small amount of loss approximately the same figures arrived at by the combined draft surveys in Bombay and Kandla, India—the

surveys taken after the cargo had been loaded on board and that had formed the basis for the numbers stated in the two bills of lading. However, the general inaccuracy of the draft survey method *per se* is suggested by the 70 metric ton discrepancy between the draft survey estimate made after completion of discharge at Felixstowe on April 27, 1983, and that made by a somewhat different draft survey method prior to the commencement of discharge at Hull the same day.

The discharge activities themselves at both Felixstowe and Hull were uneventful in that there was no leakage or spillage from the lines that led from the vessel to the Intermol receiving tanks on shore. Upon termination of discharge at the second port, Hull, an Intermol employee inspected the vessel's tanks and issued a dry tank certificate representing that the tanks were empty and well drained for discharge purposes. Accordingly, the court finds that all of the cargo which passed the vessel's permanent hose connection was received in the shore tanks.

The Intermol shore tanks at both Felixstowe and Hull were equipped with precision molasses measuring devices called pneumercators. Pneumercators are used extensively in the molasses trade and had been used by Intermol since 1968. They operate by means of a delicately adjusted air chamber which communicates with a mercury gauge calibrated for the particular tank whose contents it is measuring. The pressure of the weight of molasses inside of the storage tank forces the mercury up the glass gauge tube. The mercury level is then read off on a Vernier Scale. Pneumercators, which may be used with shipboard tanks as well as on shore tanks, provide a more reliable and accurate method of measuring molasses than draft surveys can furnish. Draft surveys, though commonly used in cargo measurement, are comparatively crude in their technique and correspondingly give less accurate measures than pneumercators.

The Intermol shore tank pneumercator readings at both Felixstowe and Hull, each taken immediately upon receipt of the molasses discharged from the *Globe Nova*, indicated a 253

metric ton shortfall in the amount of molasses received as compared to the 18,952 metric ton amount to which Intermol was entitled under the bills of lading issued at Bombay and Kandla. The pneumercator readings showed that 9,074 metric tons of molasses were delivered at Felixstowe and 9,625 metric tons at Hull, for a total delivery of only 18,699 metric tons. Intermol reports setting forth a total delivery to the shore tanks of only 18,699 metric tons were based on these pneumercator readings and did take into account the molasses in the pipeline leading from the Globe Nova to the storage tanks at each port.

The pneumercators at the Intermol shore tanks at both Felixstowe and Hull were properly maintained and were in good working order at the time the Globe Nova shipment was calculated. The outturn quantity of 18,699 metric tons of molasses as set forth in the detailed Intermol delivery reports from Felixstowe and Hull accurately reflects the quantity of molasses delivered by defendants through the permanent hose connections of the S/S Globe Nova.

At both Felixstowe and Hull, notations were made by Intermol representatives on the reverse side of each bill of lading stating the respective outturn quantities as measured in the shore tanks. On May 3, 1983 at the completion of the Globe Nova's entire cargo discharge upon the accomplishment of the Hull shore tank delivery, Intermol presented a Notice of Claim to the vessel's agent. This claim was for the non-delivery of 253 metric tons of molasses, as indicated by the combined shore tank pneumercator readings at the Intermol facilities.

Damages for the non-delivery of molasses by defendants to Intermol shall be calculated according to the following facts. The molasses purchase shipped on the Globe Nova was made in order to fulfill Intermol's existing resale obligations rather than as inventory. The 253 metric tons of molasses that were not delivered would have been sold in accordance with the Intermol Product price list which reflects the product's sound market value at the time of the molasses' discharge from the Globe Nova. Accordingly, the value of the cargo not delivered to Intermol by defendants was \$48,502.62. Defendants have

offered no evidence placing plaintiff's proof of damages into question.

Plaintiff Insurance Company of North America filed this suit on its own behalf as subrogee of the insured Namolco interests, as well as on behalf of the shipper, consignee, and owner of the cargo in question. INA's insured adopted and ratified the pursuit by INA in this litigation of the damages due in excess of INA's insurance payment of \$27,950. The average prime rate of interest prevailing between the date of the disputed cargo's discharge in England in May 1983 and April 10, 1985 was at least 11.35% per annum

DISCUSSION

Plaintiff, as subrogee of the consignee of a shipment of Indian cane molasses, brings this suit for non-delivery of cargo pursuant to the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. 1300 et seq. Under COGSA a consignee establishes a *prima facie* case against a carrier simply by demonstrating full delivery of the cargo to the carrier in good condition, and out-turn of the cargo in damaged condition or less than the amount due. *Spencer Kellogg v. S/S Mormacsea*, 703 F.2d 44, 46 (2d Cir. 1983); *Westway Coffee Corp. v. M.V. Netuno*, 675 F.2d 30, 32 (2d Cir. 1982). Once the consignee proves its *prima facie* case, the burden then shifts to the carrier to show that the loss or damage demonstrated falls within one of the COGSA exceptions set forth in 46 U.S.C. Section 1304. See *Westway Coffee Corp.*, *supra* at 32.

A. Delivery of Goods to the Carrier.

The first half of plaintiff's *prima facie* showing that a discrepancy exists between the amount of cargo delivered to the carrier and the amount of cargo discharged consists, of course, of a showing that the carrier fully received the cargo in good condition initially. Plaintiff can usually rely on the carrier-issued bill of lading to make this first half of his showing because the bill of lading, itself, supplies *prima facie* evidence of the cargo's weight and other characteristics upon delivery. 46 U.S.C. Section 1303(4); *Westway Coffee Corp. v. M.V. Netuno*, 675 F.2d

30, 32 (2d Cir. 1982). Although a clean bill of lading attesting to the apparent good order and condition of the cargo will not constitute a *prima facie* showing of the cargo's good condition where the manner of packing allows for the possibility of concealed, internal conditions that were not apparent to the external observer, see *Caemint Food, Inc. v. Braslieiro*, 647 F.2d 347, 352 (2d Cir. 1981), weight is a different matter. Once a carrier lists the weight of the goods on the bill of lading, and especially if there is a ready means of verification or if a verification has been made, he represents that he has no reasonable ground for suspecting that the weight of the goods actually received varies from the listed weight. See 46 U.S.C. Section 1303(3)(c).

Furthermore, a carrier is bound by its bill of lading representations concerning cargo quantities received on board regardless of whether any misstatements by it of the quantity were fraudulent or intentional. See *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841, 847-48 (2d Cir. 1985). Similarly, whether or not a carrier has actually received on board the cargo represented in its bill of lading, absent some indication on the bill of lading signaling the non-receipt of the cargo or a portion thereof, a carrier is estopped from disclaiming receipt of the goods. *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841, 845-849 (2d Cir. 1985); *General Foods Corp. v. The Felipe Camarao*, 172 F.2d 131 (2d Cir.), cert denied, 337 U.S. 908 (1949); *Van Ekris & Stoett, Inc. v. S.S. Rio Paraguay*, 573 F. Supp. 1475, 1479 (S.D.N.Y. 1983).

In view of the status of bills of lading as negotiable documents, and the fact that they are heavily relied upon by buyers in arranging for payment via letters of credit, the importance of holding a carrier to the representations made in a bill of lading should be obvious. See *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841, 845-848 (2d Cir. 1985); *Van Ekris & Stoett, Inc. v. S.S. Rio Paraguay*, 573 F. Supp. 1475, 1478 (S.D.N.Y. 1983). As recently stated by the Second Circuit in a decision holding a defendant carrier liable for non-delivery of goods which indisputably were never delivered to the carrier in the first place, "the necessity for maintaining the integrity of and confidence

in bills of lading has been recognized by us in a line of cases beginning before and continuing after the 1936 enactment of the COGSA." *Berisford Metals*, *supra* at 845. "[A] negotiable or order bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involving the sale and transportation of goods between parties located at a distance from one another." *Id.* The *Berisford* court went on to describe the commercial realities behind bills of lading. "The carrier, by issuing the bill, enables the seller to collect full payment of the purchase price from the buyer since presentation of the bill to the buyer assures it that the seller has fulfilled its commitment to ship the goods and obligates the buyer to pay for them." *Id.* at 847. If the parties to the transaction were free to question the accuracy of the bill upon presentation, the entire structure of maritime commerce would be weakened. *Id.*

B. Outturn of Goods from the Carrier.

In the instant case the two bills of lading issued by the *Globe Nova* at Bombay and Kandla unequivocally indicate a quantity of 18,952.256 metric tons of Indian cane molasses loaded on board. Defendant has made no attempt to rebut plaintiff's *prima facie* case that this was the amount received by the vessel or the true amount to which Intermol, at the other end of the voyage, was entitled. Instead, defendants argue that plaintiff has failed to make a *prima facie* case of entitlement to relief under COGSA because it has not proved a shortfall of cargo upon receipt. According to defendants, the draft survey figures taken on board the *Globe Nova* at Felixstowe and Hull are the figures to which the input figures listed on the bills of lading should be compared. If, instead of the pneumericator figures offered by plaintiff, these on board survey figures are used to show outturn, the discrepancy between cargo delivered and cargo received would be negligible and plaintiff would thus have failed to make its *prima facie* case.

Defendants' argument for using the draft survey figures instead of the pneumericator figures to determine the actual molasses outturn at the *Globe Nova* destinations in the United

Kingdom has two aspects. One turns on defendants' contention simply that it is unfair to compare figures taken by two different techniques. A discrepancy between draft survey figures and pneumercator figures reflects a discrepancy of method rather than of substance, and because it does not necessarily indicate any actual cargo loss, argue defendants, it is irrelevant to plaintiff's case. The second aspect of defendants' claim that the draft survey figures taken upon arrival at the British ports rather than the pneumercator figures should govern this dispute hinges on where and when the outturn measurements should be taken, on board the vessel prior to discharge, or in the shore tanks just after discharge. Defendants contend that since the bill of lading figures on which plaintiff relies to make the first half of its *prima facie* case were taken on board the *Globe Nova*, the outturn figures should also be based on the on board survey readings.

Both aspects of defendants' argument for using the British draft survey figures rather than the pneumercator figures are at first glance extremely appealing intuitively. Upon closer inspection, however, they collapse. Defendants' ultimately ill-placed confidence in these arguments is very understandable in light of their strong superficial appeal, and perhaps explains their rather remarkable failure to offer any rebuttal evidence whatsoever to plaintiff's *prima facie* showing of COGSA liability.

a. *What is the proper measure of a metric ton of molasses?*

Defendants argue first of all that because in India draft surveys were used in arriving at the total figure of 18,952.256 metric tons stated on the bills of lading, it is inappropriate to use pneumercator measurements at outturn to discern a shortfall. As defendants point out, the draft survey calculations taken in England indicated that the amount of molasses on board the *Globe Nova* prior to discharge in England was quite close to the amount indicated on the bills of lading. Accordingly, the argument continues, because there is substantial evidence that no discrepancy between the actual amount of molasses loaded

and the amount actually on board the ship prior to delivery in fact existed, there is no liability under COGSA.

This court has found that a comparison of the draft survey figures from loading in India with the dockside draft survey figures in England indeed reveals that no significant loss of cargo occurred during the voyage of the *Globe Nova*. This fact is inadequate, however, odd though it may seem at first blush, to relieve defendants from liability for plaintiff's cargo loss. This is because the court also finds that whether or not an actual physical loss occurred, at receipt of the cargo in England there was nonetheless a shortfall from the amount listed on the bills of lading.

It is easy to understand why such a result — finding defendants liable regardless of whether an actual loss occurred while the cargo was in their possession — is initially disconcerting. One of COGSA's most salient policies is to remove from the shipper the risk for vessel defects, and by placing it onto the carrier, the party with the stronger bargaining power, to encourage carriers to maintain seaworthy vessels and to properly handle and care for the cargo in their custody. See 46 U.S.C. Section 1303 (1), (2); *Wirth Ltd. v. S/S Acadia Forest*, 537 F.2d 1272, 1279 (5th Cir. 1976), rehearing denied 541 F.2d 281, 282; *Cameco, Inc. v. S/S American Legion*, 514 F.2d 1291, 1300 (2d Cir. 1974). In this case there is scant evidence that anything was amiss in defendants' maintenance of the vessel or its cargo during the ship's voyage from India to England. Indeed, it seems not unlikely that had defendants made any effort to rebut plaintiff's *prima facie* case by invoking the exceptions to liability set forth in 46 U.S.C. Section 1304 (1) and (2), they would have had a possibility of prevailing. Defendants could have attempted such a rebuttal either by showing their due diligence in maintaining a seaworthy ship under Section 1304(1) or by showing pursuant to Section 1304(2)(i) that the shortfall in cargo stemmed from an act or omission of the shipper or owner of the goods. This latter showing, had it been made, would most likely have consisted of evidence that the amount of molasses delivered to the ship in India was not in fact 18,952.256 metric tons but rather fell significantly short from that amount.² Accordingly, one suspects that had defendants presented any evidence on

either the vessel's condition or on their care and/or responsibility for the cargo as listed on the bills of lading, they would have been able to demonstrate that during the ocean carriage here at issue, they offended neither of the important COGSA interests of carrier responsibility for seaworthiness nor of carrier responsibility for proper handling of cargo.

The ruling in favor of plaintiffs in this case, however, is not based on an affirmative finding that defendants actually lost cargo entrusted to it, but rather, simply on plaintiff's success in making an un rebutted *prima facie* case under COGSA. Plaintiff has shown a discrepancy between the amounts recorded on the bills of lading and the amount of cargo delivered, as measured by the shoretank pneumercator readings which the court has decided give the truest indication of actual outturn. See *infra* at 20-28. While it is the court's sense that the real cause for this discrepancy was probably an initial inaccuracy in the bill of lading figures due to the crudeness of the measurement techniques used in Bombay and Kandla, this possibility is irrelevant to plaintiff's ability to make out a *prima facie* case under COGSA. Whether any molasses cargo was in fact lost during the India to England voyage of the *Globe Nova*, once a discrepancy between the bill of lading amount and the amount delivered to the buyer or consignee has been established, a carrier is still liable for non-delivery to the buyer – even if the goods had never made it onto the ship in the first place. See *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841 (2d Cir. 1985) (carrier liable for full amount of cargo listed on carrier-issued bill of lading despite fact that part of this amount was never loaded on board and despite carrier's lack of knowledge or intent of the shortfall, where carrier's representations about cargo involved observations within its power as opposed to representations involving latent conditions not within its power or duty to inspect).

This result should not be surprising once it is remembered that besides its policies favoring carrier responsibility to maintain seaworthy vessels and to handle cargo properly, just as centrally, COGSA embodies extremely important policies encouraging the use and reliability of ocean bills of lading. See *supra*

pp. 12-14. See also 46 U.S.C. Section 1303 (3), (4); *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959); *Beresford Metals Corp. v. S/S Salvador*, 779 F.2d 841, 845-849 (2d Cir. 1985); *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 11-12 (2d Cir. 1969). The deference given to bills of lading in the COGSA scheme, as evidenced by the weight they are given in the making out of the first half of a claimant's *prima facie* case, see *supra* at 11-14, is merely one aspect of the COGSA's overall aim to enforce carrier accountability for the representations made on bills of lading.

What is at stake in the instant case is precisely the reliability of carrier issued bills of lading. If the draft surveys taken in Bombay and Kandla resulted in figures that did not accurately reflect the amount of cargo actually on board, the parties who paid money based on these figures as listed on the bills of lading should not be the ones to bear the loss. This comports quite squarely with the general policy under COGSA to provide protection for the shipper in light of the greater bargaining power of the carrier as the issuer of the bill of lading. See *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 945 (2d Cir. 1967), cert. denied 389 U.S. 831.

Thus the fact that a particular method of measurement was used in arriving at the bill of lading figures is irrelevant to the question of which method should be used to measure outturn. The consignee is entitled to receive the amount of cargo listed on the bill of lading, plain and simple. Accordingly, the fact that a draft survey method was used to measure delivery in India is no reason to prefer a draft survey method at outturn. The symmetry of defendants' argument is satisfying, but its logic is not. To require the same method of measurement at both delivery and outturn could, in a particular case, simply boil down to a presumption in favor of tipped scales at both ends. Clearly this is not where we want to end up. The desire for symmetry appealed to by defendants is misplaced where what the court must decide is simply which outturn measurement, whether because of its technique or its timing, in fact provides

the most accurate reflection of actual outturn. Accordingly, defendants' first argument for rejecting the use of plaintiff's pneumericator figures for measuring outturn and for establishing plaintiff's *prima facie* case must fail.

b. *What is the proper measure of actual cargo discharge, pre-discharge figures or post-discharge figures?*

The second aspect of defendants' argument against plaintiff's use of pneumericator figures to make its *prima facie* case for cargo loss goes to the proper time and locus for measuring the cargo outturn. Since the bill of lading figures derive from measurements taken on board the vessel, argue defendants, the outturn figures should correspondingly be derived from the on board measurements taken prior to discharge at the British destinations. According to defendants, the argument is more than an aesthetic one. Under the terms of the relevant charter party for this voyage, which was incorporated by reference into the bill of lading, the carrier's responsibility for the cargo extended "only so far as the Vessels's permanent hose connection, where delivery of the cargo shall be taken by the Charterer or its Consignee." Thus, defendants should not be liable for any loss occurring in the ship-to-shore pipeline itself, or any loss attributable to shoretank malfunction or to any other event occurring once all the cargo had traversed the ship's manifold.

Defendants have cited numerous cases relying on onboard cargo measurements at the port of destination to assess cargo outturn for purposes of determining whether plaintiff has made out its *prima facie* case under COGSA, and which squarely reject the proposal that the consignee's post-delivery shoretank figures be used instead. See, e.g., *Unilever/Lever Brothers Ltd., v. M/V Stolt Spur*, 1984 A.M.C. 2486 (S.D. Tex. 1984); *Wesco International v. M/V Tide Crown*, 1985 A.M.C. 189 (S.D. Tex. 1983); *Kerr-McGee Refining Corp. v. M/V La Libertad*, 529 F. Supp. 78 (S.D.N.Y. 1981); *Dow Chemical Co. v. S.S. Giovannella D'Amico*, 297 F.Supp. 699 (S.D.N.Y. 1971); *Centerchem Products, Inc. v. A/S Redereit Od fjell*, 1972 A.M.C. 373 (E.D. Va. 1971). Under the facts of all these cases the carrier's contractual liability extended only to the vessel's manifold. Accordingly, as far as concerns the parties' agreed upon liability,

they present factual situations quite comparable with the present case.

Central to the rationale in many of the above cases for using on board pre-discharge measures rather than shoretank post-discharge measures was the observation that pipeline connections are often extensive and complex, are beyond the carrier's knowledge, and in any event are beyond its responsibility. See, e.g., *Centerchem Products, supra* at 375. Accordingly, to allow a COGSA plaintiff to use shoretank outturn figures to make its *prima facie* case under the statute might end up rendering the carrier liable for events or losses that occurred after the cargo was in fact beyond the carrier's control and responsibility.

There is no question in this case that under the obligations of the charter party as incorporated in the bill of lading, defendants should not be liable for any cargo loss occurring after the molasses cargo had fully passed from the *Globe Nova* into the ship-to-shore pipelines off the coasts of Felixstowe and Hull. The outturn figure that must be used in determining whether plaintiff has made its *prima facie* case under COGSA are thus clearly those figures best reflecting the amount of molasses that actually passed beyond the permanent hose connection of the *Globe Nova*. The question remains however, which calculation — the pre-discharge calculation taken on board prior to discharge, or the post-discharge calculation taken in the consignee's offshore cargo tanks — is in fact the best reflection of the amount actually discharged.

Temporally and physically, the legal discharge point occurs between the time and place of the on-board cargo survey and the time and place of the post-delivery survey. Thus, unless a cargo measurement is made right at the edge of the vessel's permanent hose connection at the very moment of discharge, there is always a possibility of inaccuracy. There will be a discrepancy between the amount calculated in the on-board cargo measurement and the cargo actually discharged if, for example, between the time of the on-board survey and actual discharge, an explosion rips through one of the vessel's cargo tanks or if a small barge comes up alongside and siphons off an interesting

quantity of cargo. Conversely, there will be a discrepancy between the actual discharge amount and the amount measured in the shoretanks if subsequent to passage through the permanent hose connection, a hose springs a leak and an offshore spill occurs, or less innocently, if some unsavory character himself draws off a bit of the valuable cargo from the shoretank before the shoretank measurements are registered.

A further obvious possibility for deviation of either the on board survey or the shoretank measurement from the amount of cargo actually discharged lies in the measurement technique. If the on board figures are flawed due to the reader's poor eyesight or the crudeness of the measurement technique used, such that they fail even to state accurately the amount of cargo present at the moment it is being measured, these figures will, of course, also be inadequate indications of the amount of cargo actually discharged through the ship's permanent hose connection a short while later. The same would be the case if the shoretank figures were flawed due to misreading or to primitive technique, and thus not truly reflective of the cargo amount actually measured in the shoretank much less of the amount that had just been discharged from the vessel.

In each of the cases cited by defendants for the proposition that on board figures rather than shoretank calculations should be used in establishing plaintiff's *prima facie* case, *supra* at p. 21, it was found that under the facts presented, the on board pre-discharge measurements most accurately reflected the amount of cargo actually discharged; thus they were the most appropriate figures for plaintiff to use in setting up its *prima facie* case under COGSA. Other tribunals, however, in determining whether plaintiff has made out its *prima facie* case under COGSA, have taken plaintiff's shoretank figures as most accurately reflecting the amount of cargo actually discharged from the vessel at its legal delivery point at the ship's manifold. See, e.g., *Spencer Kellogg v. S.S. Mormacsea*, 703 F.2d 44 (2d Cir. 1983) (affirming 538 F.Supp. 230 (S.D.N.Y. 1982)); *Amoco Oil v. Lorenzo Halcoussi*, 1984 A.M.C. 1608 (E.D. La. 1983); *Palmco, Inc. v. American President Lines, Ltd.*, 1978 A.M.C. 1715 (D. Or. 1978).

In this case, the court has determined that it is the shoretank pneumercator figures, rather than the on board draft survey figures prior to discharge that best reflect the amount of cargo actually passing through the ship's manifold at Felixstowe and Hull. Unlike in the cases cited by defendant, all of which involved petroleum cargos and on board amounts based on ullage figures,³ the on board measurements in this case were arrived at through draft surveys, a method which this court has found to be significantly less reliable than the pneumercator technique. Moreover, the court is somewhat troubled by those cases cited by defendant in that while they justly consider the possibility that cargo losses may occur between discharge and shoretank receipt, they fail adequately to consider the possibility that losses may also occur between on board cargo measurement and actual discharge of the cargo. There is nothing intrinsically more reliable about on board figures as compared to shoretank figures. Their reliability, just as with shoretank figures, depends on the amount of time between measurement and actual discharge, as well as on the complexity of the route the cargo must travel between measurement point and discharge point and the likelihood of intervening diversions of cargo. It should be noted, moreover, that in those cases preferring the on-board figures to the shoretank figures, the COGSA interest in the carrier's maintenance of a seaworthy vessel takes center stage, while the statute's crucial purpose to promote the reliability of bills of lading is completely lost from view. But see *Westco International v. M/V Tide Crown*, 1985 A.M.C. 189, 197 n.8 (S.D. Tex. 1983). By focussing on the probability of actual cargo loss through some fault of the shipper in deciding that it would be inappropriate to allow plaintiff to use shore tank figures in making its *prima facie* case, these decisions tend to bypass the COGSA burdens of proof favoring the shipper. Similar is their tendency to ignore the fact that whether or not cargo loss in fact occurs, a carrier may still be liable for failing to deliver what it promised in the bill of lading.

In contrast, those decisions allowing plaintiff to use shoretank figures to establish the amount of cargo discharged, involved, as does this suit, situations where the court affirmatively found that the shoretank figures rather than the pre-discharge on board

figures provided the best evidence of how much cargo was actually discharged from the vessel. For example in *Amoco Oil v. Lorenzo Halcoussi*, 1984 A.M.C. 1608 (E.D.La. 1983) because the carrier's on board figures at both loading and discharge were based on inaccurate measurements, shoretank figures were used to determine discharge. In *Spencer Kellog v. S.S. Mormacsea*, 703 F.2d 44 (2d Cir. 1983), storage tank figures rather than on board figures were used where accurate on board figures simply were never made. Similarly, in *Palmco, Inc. v. American President Lines, Ltd.*, 1978 A.M.C. 1715 (D. Or. 1978), an extremely well reasoned case giving due cognizance to the important COGSA policies regarding bills of lading, the court decided after a careful assessment of the relative reliability of the two different measurement techniques used on board and on shore to look to the offshore figures as most accurately reflecting the amount of cargo actually discharged.

In the instant case, the court's determination that the shoretank figures should be used to establish the cargo outturn in the United Kingdom is based on its factual finding that, in general, pneumatic measurement of large quantities of molasses is far more accurate than measurement accomplished by the older and less technically sophisticated draft survey method. Significantly, plaintiff presented un rebutted evidence that the shoretank pneumaticators at both Felixstowe and Hull were well maintained and in good working order at the time of the calculations in question. Thus, all things being equal, the pneumaticator figures are a more reliable reflection than the draft survey figures of the amount of cargo actually discharged from the *Globe Nova*. Additionally, plaintiff has offered evidence that no cargo loss occurred after the molasses had passed from the ship on its way through the hose connections to the shore. Defendant has offered no evidence to place in doubt the court's conclusion that there was no cargo loss between ship-side and shore or in the shoretanks themselves, if in fact any occurred at all. Thus there is no reason to suspect that the pneumaticator figures might be skewed by cargo losses occurring in the shore pipeline between the time of discharge from the vessel and receipt into the shoretank.

Accordingly, the court having found that in this case plaintiff's shoretank figures are a more accurate indication of the amount of cargo discharged from the *Globe Nova* than the on-board draft survey figures, plaintiff has clearly established its *prima facie* case under COGSA. As indicated in the bills of lading, 18,952.256 metric tons were or should have been received on the vessel in India. As indicated by the pneumericator readings at Felixstowe and Hull, 18,699 metric tons were out-turned by the vessel in England. This discrepancy is by itself adequate to make out a *prima facie* case under COGSA. Because defendants have offered no evidence to rebut this *prima facie* case, they are liable to plaintiff, as subrogee of the consignee in England, for the non-delivery of 253 metric tons of molasses.

DAMAGES

Plaintiff is entitled to damages based on the fair market value of the cargo loss at discharge. *Interstate Steel Corp. v. S/S Crystal Gem*, 317 F. Supp. 112, 121 (S.D.N.Y. 1970). As insurer, plaintiff is entitled to recover the amount it paid out to its assured, as well as the balance of the damages for and on behalf of its assured Namolco. See *Insurance Company of North America v. S/S Italica*, 567 F. Supp. 59, 63 (S.D.N.Y. 1983). Furthermore, plaintiff is entitled to prejudgment interest at the average prime rate, see *Mitsui & Co., Ltd. v. American Export Lines, Inc.*, 636 F.2d 807, 824 (2d Cir. 1981); *Delphinus Maritime Limitation Proceeding; Mari Boeing*, 1982 A.M.C. 796, 812 (S.D.N.Y. 1982), from the date of discharge to present. *Mitsui & Co., Ltd. v. American Export Lines, Inc.*, *supra* at 823.

CONCLUSION

Plaintiff having made out a *prima facie* case of defendants' liability under the Carriage of Goods by Sea Act, unrebutted by defendants, plaintiff is entitled to recover in full the value of the non-delivered cargo to the cargo's receiver, Intermol, Ltd. The court finds defendant liable for non-delivery of 253 metric tons of molasses at a total value of \$48,502.62. Plaintiff is awarded pre-judgment interest at a rate of 11.35% from April

27, 1983 to April 10, 1985. The parties are directed to submit findings to the court concerning the average prime rate of interest between April 10, 1985 and the date of this judgment so that the court may determine the rate of the additional prejudgment interest to be awarded.

Dated: New York, New York
May 19, 1986

s/Constance Baker Motley

CONSTANCE BAKER MOTLEY
Chief Judge

FOOTNOTES

1. The relevant financial and shipping arrangements for the molasses purchase at issue in this case are as follows. The seller of the molasses, The State Trading Corporation of India, had entered into a letter of credit arrangement with Namolco, A.G. and various banks for the purchase of 20,000 metric tons of Indian cane molasses F.O.B., five percent plus or minus at buyer's option, at a set dollar amount. This was an irrevocable, unrestricted, without recourse to drawer letter of credit which specified that payment of 100 % of the invoice value of the cargo would be made by Namolco's bank upon presentation of complete shipping documents, including the clean on board bills of lading. Each of the two negotiable bills of lading issued at Bombay and Kandla mentioned the letter of credit pursuant to which the total shipment of 18,952.256 metric tons of molasses was purchased and shipped.

After the loading of the cargo on the "Globe Nova" and the issuance of the bills of lading, the bills of lading were presented to the banks. Payment was then made under the letter of credit in reliance on the total quantity of 18,952.256 metric tons stated by the carrier in the two bills of lading. Accordingly, as provided in the letter of credit, and at the rate stated therein, Namolco paid 100 % of the invoice price for 18,952.256 metric tons of molasses.

2. Had defendants attempted the second of these rebuttals, i.e., that the amount of molasses delivered to the Globe Nova was not in fact 18,952.256 metric tons, they would have had a difficult route to success. Any argument that the shipper or owner of the goods was at fault for supplying to the carrier an apparently inaccurate account of the goods to be shipped might be quite vulnerable if it is defendants themselves and not the shipper or owner who are responsible for the inaccurate draft surveys taken on board the Globe Nova in both Bombay and Kandla and which formed the basis for the bills of lading issued in these ports. See 46 U.S.C. Section 1304 (2)(q) (persons claiming benefit of exception to liability under 46 U.S.C. 1302(2) have burden of proving that neither actual fault or privity of the

carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage). If the defendant carrier was responsible for these measurements, this might also compromise his indemnification rights against the shipper under Section 1303(5) of COGSA which provides for carrier indemnification where inaccuracies in a bill of lading are caused by inaccuracies in the figures furnished by the shipper. It is noteworthy in mentioning the possibility of carrier indemnification rights here, that even if the carrier could prove entitlement to indemnification from this shipper under Section 1303(5), this would "in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper." 46 U.S.C. Section 1303(5).

3. Ullage is the distance from the top of a tank down to the surface of the cargo. The weight of the cargo is determined by first ascertaining the cargo's volume. The volume is arrived at by comparing the known volume of the tank with the volume of empty space in the tank above the cargo line. See *Dow Chemical Co. v. S.S. Giovannella D'Amico*, 297 F.Supp. 699, 707 (S.D.N.Y. 1969).

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 9th day of July one thousand nine hundred and eighty-seven.

INSURANCE COMPANY OF NORTH
AMERICA,

Plaintiff-Appellee,

— against —

S/S "GLOBE NOVA" her engines, tackle,
boilers, etc., THE GLOBE TANKERS,
GLOBE TRANSPORT AND TRADING
COMPANY LTD., WILLOW GROVE
SHIPPING COMPANY LTD., GAMMA
SHIPPING CO., INC. and GLOBE
TANKER SERVICES, INC.,

Docket No. 86-7550

Defendants.

THE GLOBE TANKERS, GLOBE
TRANSPORT AND TRADING COM-
PANY LTD., GAMMA SHIPPING CO.,
INC. and GLOBE TANKER SERVICES
INC.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the ac-
tion be reheard in banc having been filed herein by counsel for
the Appellee INSURANCE CO. OF NORTH AMERICA

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

NOV 9 1987

No. 87-561

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

—against—

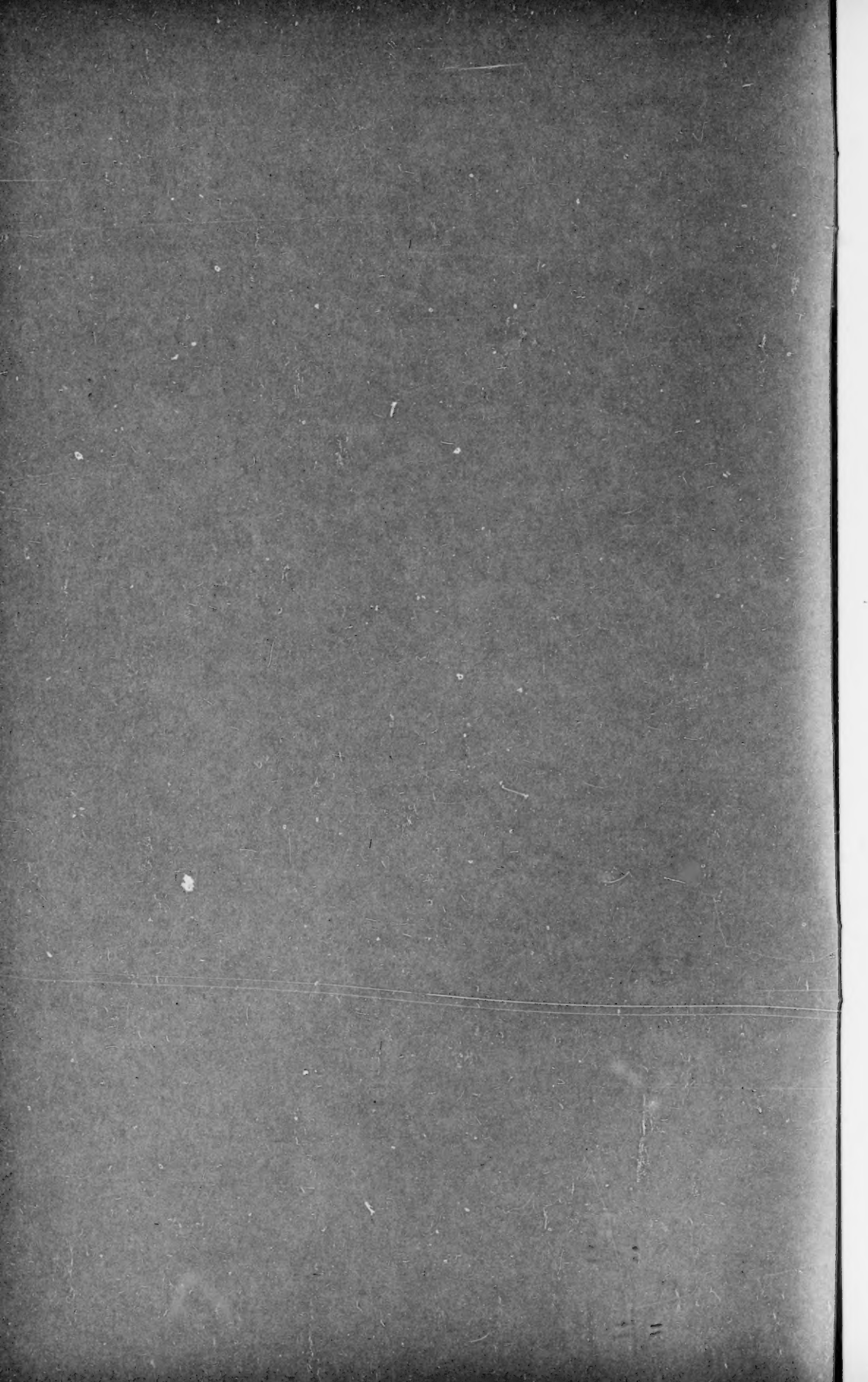
GLOBE TANKERS, GLOBE TRANSPORT AND TRADING CO.,
LTD., GAMMA SHIPPING, INC. and GLOBE TANKER SER-
VICES, INC.,*Respondents.*

**RESPONDENTS' BRIEF IN OPPOSITION TO THE
PETITION OF INSURANCE COMPANY OF NORTH
AMERICA FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. Did the second circuit disregard *Anderson v. Bessemer City*, 470 U.S. 564 (1985) and exceed its authority under Fed.R.Civ.P. 52(a) in reversing the district court's decision that petitioner made out a *prima facie* case under C.O.G.S.A. (46 U.S.C. § 1300 *et seq.*) by relying on shore tank measurements made after the shipowner's liability for the cargo ended?

2. Did the second circuit breach the rules of judicial construction by reversing the district court's decision for having ignored the "normal rule . . . that the same methods of measurement should be used at delivery and offloading, and that offloading measurements should be made on board the vessel" (A-7)?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-561

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

—against—

GLOBE TANKERS, GLOBE TRANSPORT AND TRADING CO.,
LTD., GAMMA SHIPPING, INC. and GLOBE TANKER
SERVICES, INC.,

Respondent.

**BRIEF OF GLOBE TANKERS, GLOBE TRANSPORT AND
TRADING CO., LTD., GAMMA SHIPPING, INC. AND
GLOBE TANKER SERVICES, INC., IN OPPOSITION**

OPINIONS BELOW

The opinions below are adequately cited and reproduced in the petition. References herein to the text of those opinions will be to the page number appearing in the appendix to the petition.

STATUTE AND RULE INVOLVED

In addition to the involvement of the statute and rule cited by petitioner (C.O.G.S.A. 46 U.S.C. § 1300 *et seq.* (1936), Fed.R.Civ.P. 52(a)) the petition is governed by Rule 21(5) of this Court's Rules Governing Writs of Certiorari.

Rule 21(5) of the Supreme Court Rules Governing Writs of Certiorari provides, in its pertinent part, that:

The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and

adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

STATEMENT OF THE CASE

Respondent deems it necessary to include this statement in order to correct the omissions and inaccuracies appearing in the statement portion of the petition.

Petitioner commenced this admiralty and maritime action seeking to recover \$40,000.00 (later amended to \$48,502.62) for alleged short delivery of a shipment of molasses carried aboard respondent's vessel, the GLOBE NOVA from Bombay and Kandla, India to Felixstowe and Hull, England during March-May 1983.

On March 27-29 and on April 1, 1983 representatives acting on behalf of petitioner, among others, attended aboard the vessel at each of the two load ports to calculate the quantity of molasses which had been loaded. Utilizing the draft survey procedure, a method commonly used in cargo measurement (A-12), the cargo was weighed (on board the vessel upon completion of loading at each load port) (A-10). Following performance of the respective draft surveys, a bill of lading was issued, one for the Bombay cargo and a second for the Kandla cargo.

Each bill of lading specifically incorporated by reference the terms of the charterparty pursuant to which the cargo was shipped (A-10). Clause 7 of the charterparty provided, in its pertinent part, that:

The cargo shall be pumped into the vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel, *only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its consignee (A10) [emphasis added]*.

Approximately three weeks after loading was completed, the vessel arrived at Felixstowe (A-11). Upon arrival and again following completion of discharge, draft surveys were performed by the cargo receiver (petitioner's subrogor) (A-11).

Thereafter, the vessel proceeded to Hull where the remainder of the molasses cargo was discharged (A-11). Once again, on arrival and following completion of discharge, draft surveys were performed by the cargo receiver (A-11). In addition, upon completion of the Hull discharge, an employee of the cargo receiver inspected the vessel's tanks and issued a dry tank certificate representing that the tanks were empty and well drained (A-12).

The combined results of the draft surveys indicated in the words of the district court, that:

with only a small amount of loss approximately the same figures arrived at by the combined draft surveys in Bombay and Kandla, India . . . and that had formed the basis for the numbers stated in the two bills of lading (A-11-12).

And, that:

no significant loss of cargo occurred during the voyage of the GLOBE NOVA (A-18).

After the cargo passed the vessel's permanent hose connection (located on board the vessel) it travelled through shore pipelines located at the receiver's shore facility to the shore tanks (A-11). The shore tanks were equipped with measuring devices called pneumercators (A-12). The pressure of the weight of the molasses in the shore tank enabled a reading to be made off a scale thereby measuring the quantity in the shore tanks (A-12-13).

The combined shore tank pneumercator readings indicated a 253 metric ton short fall when compared with the ship board draft survey, based on the combined bills of lading amount (A-13-14). Petitioner sued to recover the value of the 253 metric tons of molasses.

At the trial, respondent took the position that petitioner failed to make out a *prima facie* case in that no loss of any significance was shown to have occurred based on the draft survey results. For this reason, no evidence was put forward by respondent regarding the seaworthiness of the vessel or the voyage in general (A-18). The district court, however, found that there was "scant evidence that anything was amiss in defendant's maintenance of the vessel or its cargo during the ship's voyage from India to England" (A-18).

The district court concluded that, indeed, it could not find that an actual loss of cargo occurred while entrusted to respondents (A-18-19). Nonetheless, the Court ruled for petitioner because it found petitioner (plaintiff below) had shown a loss based on the discrepancy between the combined bills of lading amount and the shore tank pneumercator readings, which readings the district court decided gave a more accurate indication of actual outturn than did the draft surveys (A-19). Respondents appealed.

The second circuit reversed, not because it found the shore tank pneumercator readings were any less accurate than the district court found them to be but, rather, because the district court did not follow the normal rule of law applicable in cases such as these which provides that shore tank measurements cannot be relied upon to make out a *prima facie* case where the liability of the carrier ends, as it did here, at the vessel's permanent hose connections (A-6). The error of the district court was in "failing to use the same method for measuring cargo at offloading that was used at delivery" (A-6) i.e., the on board draft surveys which indicated a "nonactionable" "insignificant shortage" (A-3, 18).

Petitioner petitioned for a rehearing and a rehearing *en banc*. The petition was denied, with the following additional comment.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon (A-31).

SUMMARY OF THE ARGUMENT FOR DENYING WRIT

The petition in its entirety, beginning with the questions presented, is unfortunately nothing more than a smokescreen. Replete with distortions and inaccuracies it is designed to obfuscate the true reason for the second circuit's reversal of the district court's decision. The court of appeals reversed because, simply put, the district court erred as a matter of law in failing to apply the normal rule of law governing the proper disposition of matters such as the one at issue.

Even a superficial comparison of the two opinions reveals that in concluding the district court erred, the second circuit not only did not disregard the findings of fact of the trial court, contrary to petitioner's allegations, but actually adopted them. Moreover, a review of the cases cited by the second circuit, which include all of the cases cited by the district court, plus others, firmly supports the conclusion that where, as here, delivery of the cargo is completed at the vessel's permanent hose connection (located on board the vessel), it is

[a]t that point that the shipowner's liability ends, the risk of loss shifts, and a plaintiff cannot make out a *prima facie* case under COGSA by showing later measurements (A-6).

In light of the foregoing, there is no basis for granting the petition. Consequently, it should be denied.

ARGUMENT

I

**THE PETITION SHOULD BE DISMISSED FOR
FAILURE TO COMPLY WITH RULE 21(5) OF
THIS COURT'S RULES GOVERNING WRITS
OF CERTIORARI**

Rule 21(5) of the Supreme Court Rules Governing Writs of Certiorari provides, that:

The failure of a petitioner to present with *accuracy*, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition [emphasis added].

The reason for this rule should be self evident. Since it is impossible for the Supreme Court to examine the record in depth before ruling on the petition, it must rely to a great extent on the preliminary papers. Consequently, a clear, definite and complete disclosure concerning the controversy is critical in petitioning for a writ of certiorari, *Southern Power Co. v. North Carolina Public Service Co. N.C.*, 263 U.S. 508, 44 S.Ct. 164 (1924). Respondent respectfully contends petitioner has violated the rule.

Distortions of the facts begin in the statement portion of the petition. For example, the witness referred to as having "attended to the discharge of the cargo at issue" (Pet. p. 3) was only present at one of the two discharge ports, Hull. (See appended material from Joint Appendix filed on appeal, hereinafter required to as "Resp. A") (Resp. A-1, 2, 3). Moreover, he performed only the draft surveys at that one port, contrary to petitioner's representation (Resp. A-3).

Furthermore, he did not testify that the draft survey readings were "rough estimates" as petitioner states (Pet. pp. 3, 6). The draft survey reports, which he signed contained the following *crossed out* sentence: "I hereby estimate and testify that

_____ [unfilled blank in the original] metric tons of Black Strap Molasses was loaded/ discharged." This entire sentence was *deleted* in its entirety (Resp. A-4-9). In fact, the witness testified that on occasion there was no other method of verifying what is aboard a vessel (Resp. A-10).

Even in summarizing the opinions issued below distortions abound. The district court, when referring to the locus of the pneumercators relied on by petitioner, at all times makes clear that they were not merely "shoreside" as stated by petitioner (Pet. p. 4), but were actually in the shoretanks located approximately 1,250 feet from where the vessel was docked (A-11).

Moreover, the district court did not find that the discharge draft surveys "on which defendants relied" (Pet. p. 4) were "inaccurate, relatively crude in method, and unreliable" (Pet. p. 4). No findings of fact were made by the district court regarding the accuracy of the specific draft surveys which were performed in this case. Instead, the district court restricted its findings to the draft survey method in general or in comparison with pnemercator measurements in general (A-12, 24, 25).

Similarly, petitioner states that the second circuit reversed on the "*stated grounds* that the district court should have used the 'relatively imprecise' draft survey estimates . . . rather than the calculations based on the 'high precision measuring devices' called pneumercators" (emphasis added, Pet. p. 4). The true stated ground for the reversal, however, was that the district court did not look to the same method of measurement at offloading as was used at delivery to the vessel, i.e., the on board draft surveys in contravention of the normal rule of law applicable in cases such as these which provides that "the same measurements should be used at delivery and offloading, and that offloading measurements should be made on board the vessel" (A-7).

Petitioner also devotes a major portion of the petition to the (erroneous) allegation that the second circuit "disregarded" or "ignored" or "supplanted" the trial court's findings of fact (Pet. pp. 5, 8); the opposite is actually the case. The second

circuit adopted the findings of fact referred to by petitioner, (see Pet. pp. 6 and 7).

Indeed, the second circuit stated that "[t]he draft survey measure, is a relatively imprecise method (compare A-5 to A-25) but when compared to another measure can be used to determine if cargo has been lost" (compare A-5 to A-12). Similarly, when referring to the pneumercator readings the second circuit gave them the same deference accorded by the district court, characterizing them as "high precision measuring devices" (A-4) which are "far superior to draft surveys at measuring accurately the amount of molasses transferred to tanks" (compare A-4 to A-24, A-25). In the circumstances, the findings of fact of the trial court can hardly be said to have been in any way slighted, nor has petitioner established that the factual findings of the district court were reversed or distorted by the Appellate Court in breach of Rule 52(a) F.R.C.P. Consequently, petitioner's reliance on *Anderson v. Bessemer City*, 470 U.S. 564 (1985) is misplaced.¹

The inaccurate portrayal of the proceedings below stand as a sufficient reason for denying the petition pursuant to this Court's Rule 21(5). However, the petitioner's failure to demonstrate that the second circuit violated the teachings of *Anderson v. Bessemer City*, *supra* and Fed.R.C.P. 52(a) as alleged, is an additional reason for a denial.

¹ Petitioner also inexplicably claims that the reversal by the second circuit is "only the latest in a series of breaches" (Pet. p. 9) by that court adding that this Court in *Anderson*, *supra*, calls specific attention to that fact. Respondents' careful reading of *Anderson* does not reveal any language sufficient to support Petitioner's assertion.

II

THE SECOND CIRCUIT'S REVERSAL RESULTED FROM THE DISTRICT COURT'S FAILURE TO APPLY THE "NORMAL RULE" AS A MATTER OF LAW

The issue before the district court was not the factual question—how much cargo was outturned from the vessel—as petitioner would have this Court believe (Pet. pp. 8, 9). There was no dispute regarding what the discharge draft surveys revealed when compared to the combined bills of lading amount—an “insignificant” “nonactionable loss” (A-11, A-3).

Similarly, there was no dispute regarding what the shore tank pneumercator readings reflected when compared to the combined bills of lading amount—a 253 metric ton short fall (A-13). And neither party disputed the loaded quantity—the combined bills of lading amount, against which a comparison had to be made in order to determine whether there was, indeed, a loss of cargo (A-16).

The threshold question which the district court failed to properly meet before erroneously continuing its inquiry into the merits of one recognized means of measurement versus another was a legal one, to wit; given that where, as here, the shipowner's liability to deliver the cargo ends at the vessel's permanent hose connection (see clause 7 of the charterparty, (recited by the district court at A-10, quoted herein p. 2), can a cargo plaintiff make out a *prima facie* case under COGSA (46 U.S.C. § 1300 *et seq.*) by relying on later measurements?

The cases relied upon by the second circuit in reversing the district court's decision stand for the proposition that “the same methods of measurement should be used at delivery and offloading, and that offloading measurements should be made on board the vessel.” (A-7), *Esso Nederland v. M.T. TRADE FORTITUDE*, 1977 A.M.C. 2144, (not otherwise reported) *aff'd* without op. 573 F.2d 1294 (2d Cir. 1977), (once the defendant's responsibility for the cargo has ceased reliance upon later measurements to establish shortage is unjustified);

Centerchem Products v. A/S PEDEREA ODFJELL, 1972 A.M.C. 373 (E.D.Va. 1971) (not otherwise reported) (reliance on shore measurements necessarily involve facilities over which the shipowner has no control or expertise). Accordingly, to find the carrier responsible on the basis of shore measurements would be "burdensome if not impossible." *Dow Chemical v. S.S. GIOVANELLA D'AMICO*, 297 F.Supp. 699 (S.D.N.Y. 1969) and *N.E. Petroleum Corp. v. S.S. PRAIRIE GROVE*, 1977 A.M.C. 2139 (S.D.N.Y. 1977) (not otherwise reported), (shore figures at the discharge port do not constitute the amount of cargo delivered); *Kerr-McGee Refining Corp. v. M/V LA LIBERTAD*, 529 F.Supp. 78 (S.D.N.Y. 1977), (where the charterparty provides for delivery at the vessel's permanent hose connections plaintiff may not base a claim for shortage upon computations made at a point subsequent to the delivery point). See, *Unilever/Lever Bros. (PTY) Ltd. v. M/V STOLT SPUR*, 583 F.Supp. 139 (S.D.Tex. 1984), discussing the merits of consistency in measurements and stating that where the charterparty provides that delivery shall take place at the vessel's permanent hose connections, shore measurements at discharge are irrelevant to the shortage claim. See, *Westco International v. M/V TIDE CROWN*, 1985 A.M.C. 189 (S.D.Tex.), citing both *N.E. Petroleum Corp. v. S.S. PRAIRIE GROVE*, *supra*, and *Unilever/Lever Bros. (PTY) Ltd. v. STOLT SPUR*, *supra* with approval and stating that a comparison based on ship/shore figures is akin to "comparing apples and oranges."

Petitioner's melodramatic cry for this Court to defend the sanctity of the bill of lading is a repeat performance of the same diversionary tactic mounted unsuccessfully before the second circuit. What petitioner would have this Court overlook is that respondent at no time challenged the quantities set forth in the bills of lading.

The argument petitioner really made before the second circuit and is now replaying here, was that the court should affirm what amounted to a new rule created by the district court, to wit; that shipowners be held accountable for the most

technologically accurate measurement activities held outside their control and conducted by parties who may well benefit from "discovering" a loss. As the second circuit astutely pointed out, petitioner's argument is completely devoid of legal support or factual underpinnings (i.e., there was no showing of negligence).

As is evident from the foregoing, the petition is merely a recycled attempt to set up a factual dispute where none exists. Thus, petitioner's reasons for granting the writ are meritless.

CONCLUSION

FOR THE FOREGOING REASONS THE PETITION FOR
A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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APPENDIX



Transcript Excerpts

* * *

that we would use for tanker discharges.

Q And those, with respect to what ports were these documents issued?

A Hull and Felixstowe.

Q And did you perform any of them?

A I performed the discharge at Hull.

Q Who performed the discharge at Felixstowe?

A My terminal manager, Mr. Terry Thwaites.

MR. MAZAROLI: I offer into evidence Plaintiff's Exhibit 11, your Honor.

MR. WALKER: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 11 for identification was received in evidence.)

BY MR. MAZAROLI:

Q Referring to the second page of Exhibit 11, that report, unloading report which refers to Felixstowe, what is the total amount discharged according to that report at Felixstowe?

A The total amount discharged at Felixstowe is 9,075.983 metric tons.

Q What does that total represent?

A That represents the total discharged by, over the ship's rail through the pipeline, and calculated by shore tank numerators.

* * *

A Cargo is pumped to, continuously through the shore line into our cargo tanks.

Q I understand that, but where does it actually leave the ship's premises or the ship's rail?

A Jetty head.

Q Pardon?

A At the jetty head.

Q What does that Clause 7 refer to in terms of the ship's manifold or line?

A I am sorry, I don't understand the question.

Q All right, I'm sorry. Where it says, the vessel's permanent hose connection, where is that located?

A Well, the permanent hose connection.

Q The vessel's permanent hose connection?

A Well, that would be, I would take it to be the ship's manifold, usually situated amidships.

Q On the ship, in other words?

A Yes.

Q Did I understand you to say that you did not participate in any way, shape or form, in the Felixstowe discharge?

A That's correct.

Q With respect to the Felixstowe terminal, how many shore tanks which can receive molasses are located

* * *

A Well, I would believe my numericator before I would believe a draft survey.

Q And did you perform the draft survey? Was any draft survey performed with respect to the—

MR. WALKER: Objection, two questions.

MR. MAZAROLI: Excuse me, your Honor, I withdraw the question.

Q Was a draft survey performed at Felixstowe with respect to the Globe Nova?

A Yes.

Q Was a draft survey performed at Hull with respect to the Globe Nova?

A Yes.

Q And did you perform, who performed the draft surveys?

A The draft survey at Felixstowe was performed by my terminal manager, Mr. Thwaites, and the draft survey at Hull was performed by myself.

Q And were totals reached with, pursuant to the draft surveys at each port?

A Sorry?

Q Was a quantity total reached at each port with respect to the draft survey?

A Yes.

Q Based on your experience, in comparing the results

* * *

DEFENDANT'S EXHIBIT I

INTERMOL

SHIP DRAFT SURVEYARRIVAL / DEPARTURE

NAME OF SHIP	<i>M/T "GLOBE NOVA"</i>
DATE	<i>27/4/83</i>
TIME	<i>1845</i>
PORT	<i>HULL</i>

SURVEY

FORWARD — MEAN	<i>. 21' 06"</i>	<u>SEA STATE</u>
AFT — MEAN	<i>. 24' 10"</i>	<i>CALM</i>
MEAN F & A	<i>. 23' 02"</i>	<i>DAYLIGHT</i>
MIDSHIP PORT	<i>. 22' 04"</i>	
MIDSHIP STARB'D	<i>. 23' 11"</i>	
MIDSHIP MEAN	<i>. 23' 01 1/2</i>	
MEAN OF MEANS	<i>. 23' 01 3/4</i>	
DOUBLE MEAN OF MEANS	<i>. 23' 01 5/8</i>	
WATER DENSITY	<i>1010</i>	
DWT/DIS FROM SHIP'S SCALE	<i>1955 L/T CORR FOR</i> <i>. DENSITY 19477-974 M/T</i>	

KNOWN WEIGHTS ON BOARD

<u>IN METRIC TONNES/</u> LONG TONS	<u>REMARKS</u>
FUEL OIL	<i>..... 71.3</i> <i>DRAFT MARKS</i>
DIESEL OIL	<i>..... 29.6</i> <i>TAKEN BY</i>

[HANDWRITTEN MATERIAL IN ITALICS]

A 5

LUB. OIL	.....25.5.....	JETTY
FRESH WATER )	.....47.5.....	& SHIPS
FEED WATER)		LADDER
SLOPS	.....81.6.....	
STORES & CONSTANT	.....250.....	
DRY CARGOES	.....NIL.....	
BALLAST	.....2008.9.....	

TOTAL = 2941.9

	DISPLACEMENT	= 19477.974
DWT BY DRAFT =	LIGHT SHIP	= 6584
WEIGHTS KNOWN =	WEIGHTS KNOWN	= 2941.9
DIFFERENCE =	DIFFERENCE	= 9952 M/T

~~I hereby estimate and certify that metric tonnes of~~
~~BLACKSTRAP MOLASSES WAS LOADED/DISCHARGED.~~ The
above being based on the ship's deadweight scale.

displacement

MASTER

SURVEYED BY: CHIEF MATE

CARGO OFFICER

[HANDWRITTEN MATERIAL IN ITALICS]

DEFENDANT'S EXHIBIT J

INTERMOL

SHIP DRAFT SURVEYARRIVAL / DEPARTURE

NAME OF SHIP	<i>M/T "GLOBE NOVA"</i>
DATE	<i>3/5/83</i>
TIME	<i>2000</i>
PORT	<i>HULL</i>

SURVEY

FORWARD — MEAN	<i>.15.06</i>	<u>SEA STATE</u>
AFT — MEAN	<i>.18.09</i>	<i>CALM</i>
MEAN F & A	<i>.17.01¹/₂</i>	
MIDSHIP PORT	<i>.16.02</i>	
MIDSHIP STARB'D	<i>.17.00</i>	
MIDSHIP MEAN	<i>.16.07</i>	
MEAN OF MEANS	<i>.16.10¹/₄</i>	
DOUBLE MEAN OF MEANS	<i>.16.08⁵/₈</i>	
WATER DENSITY	<i>1008</i>	
DWT/DIS FROM	<i>13834-536 CORR 13605-084</i>	
SHIP'S SCALE	<i>.TRIM CORR 32M/T 13573-084</i>	

KNOWN WEIGHTS ON BOARD

<u>IN METRIC TONNES / LONG TONS</u>	<u>REMARKS</u>
FUEL OIL	<i>543.4</i> <i>DAYLIGHT</i>
DIESEL OIL	<i>67.9</i> <i>DRAFT MARK</i>

[HANDWRITTEN MATERIAL IN ITALICS]

A 7

LUB. OIL	.....32.5.....	TAKEN BY
FRESH WATER )	.....502.7.....	JETTY
FEED WATER)		& SHIPS LADDER
SLOPS	.....217.6.....	
STORES & CONSTANT	.....250.0.....	
DRY CARGOES	.....NIL.....	
BALLAST	.....5270.7.....	

TOTAL = 6884.8

	DISPLACEMENT	= 13573.084
DWT BY DRAFT =	LIGHT SHIP	= 6584
WEIGHTS KNOWN =	WEIGHTS KNOWN	= 6884.8
DIFFERENCE =	DIFFERENCE	= 105.284

I hereby estimate and certify that metric tonnes of
~~BLACKSTRAP MOLASSES WAS LOADED/DISCHARGED.~~ The
above being based on the ship's deadweight scale.
displacement

MASTER
SURVEYED BY: CHIEF MATE
CARGO OFFICER
REPRESENTATIVE, CHARTERERS INSPECTOR.

[HANDWRITTEN MATERIAL IN ITALICS]

A 8

A 178

INTERMOL

SHIP DRAFT SURVEY

①

ARRIVAL / ~~DEPARTURE~~

NAME OF SHIP

MTR "GLOBE NOVA"

DATE

27/4/83

TIME

1845

PORT

HULL

SURVEY

FORWARD - MEAN

21' 06"

SEA STATE

AFT - MEAN

24' 10"

CALM

MEAN F & A

23' 02"

DAYLIGHT

MIDSHIP PORT

22' 04"

MIDSHIP STARB'D

23' 11"

MIDSHIP MEAN

23' 01 1/2"

MEAN OF MEANS

23' 01 3/4"

DOUBLE MEAN OF MEANS

23' 01 5/8"

WATER DENSITY

1010

DWT/DIS FROM SHIP'S SCALE

19455 Lr CORR FRACTIONITY 19477.974 mtr

KNOWN WEIGHTS ON BOARD IN METRIC TONNES/LONG TONS

REMARKS

FUEL OIL

71.3

DRAFT MARKS

DIESEL OIL

29.6

TAKEN BY

LUB. OIL

25.5

JETT/

FRESH WATER

47.5

2 SHIPS

FEED WATER

LADDER

SLOPS

81.6

STORES & CONSTANT

250

DRY CARGOES

NIL

BALLAST

2005.9

TOTAL

- 2941.9

DWT BY DRAFT

DISPLACEMENT - 19477.974

WEIGHTS KNOWN

LIGHT SHIP - 6584

DIFFERENCE

WEIGHTS KNOWN - 2941.9

DIFFERENCE - 9952 mtr

I hereby estimate and certify that the above values of DISPLACEMENT, BALLASTS, and CARGOES/DISCHARGE are correct. The above being based on the ship's displacement scale.

SURVEYED BY:

CHIEF MATE

CARGO OFFICER

A 9

INTERMOL

A

179

SHIP DRAFT SURVEY

(2)

~~ARRIVAL~~ / DEPARTURE

NAME OF SHIP

m/t GLOBE NOVA

DATE

31/5/83

TIME

2000

PORT

HULL

SURVEY

FORWARD - MEAN

15 06

AFT - MEAN

18 09

MEAN F & A

17 01 1/2

MIDSHIP PORT

16 02

MIDSHIP STARB'D

17 00

MIDSHIP MEAN

16 07

MEAN OF MEANS

16 10 1/4

DOUBLE MEAN OF MEANS

16 08 5/8

WATER DENSITY

1008

DWT/DIS FROM SHIP'S SCALE

13834.536 CORN 13605.084
TRIM CORN 3244 13573.084

SEA STATE

CALM

KNOWN WEIGHTS ON BOARD IN METRIC TONNES/LONG TONS

REMARKS

FUEL OIL

543.4

DAYLIGHT

DIESEL OIL

67.9

DRAFT MARK

LUB. OIL

32.5

TAKEN BY

FRESH WATER)

502.7

JETTY

FEED WATER)

+ SHIPS LADDER

SLOPS

217.6

STORES & CONSTANT

250.0

DRY CARGOES

NIL

BALLAST

5270.7

TOTAL

- 6884.8

DWT BY DRAFT =

DISPLACEMENT • 13573.084

WEIGHTS KNOWN =

LIGHT SHIP • 6584

DIFFERENCE =

WEIGHTS KNOWN • 6884.8

DIFFERENCE • 105.284

~~I hereby certify and certify that~~ ~~the above is based on the ship's displacement scale.~~

~~was loaded/discharged. The above being based on the ship's displacement scale.~~

displacement

SURVEYED BY:

[Signature]

MASTER

CHIEF MATE

CARGO OFFICER

[Signature]

REPRESENTATIVE, CHARTERERS INSPECTOR.

* * *

A Well, I have no knowledge of why it's done on it, in the loading ports. I can only assume that there were no other method of verifying what was on board the vessel.

In the discharge ports, we like to do the draft survey as a last resort, because it's possible for the numercator maybe to break while the ship is discharging. It might be important if the vessel needs to sail by a certain time, and we could not get a replacement glass tube or something as simple as this.

So, therefore, this would be a last resort that we could sail a ship when, say, 9,000 tons or 8,000 tons left on board by draft, and this would be important if we were discharging around our own coast where two or three of our terminals, we have limited storage space, and it would be very embarrassing to arrive, shall we say, at a terminal that could take 8,000 tons, and we have 9,000 tons on board.

What would I do with the other thousand tons? I would find myself in a rather embarrassing position.

Secondly, a draft survey is conducted to try to determine if there is any reason to believe the cargo had been contaminated. If we just connected up the hose pipe to the ship's manifold and started to pump, it might be months later we would find some of our customers'

* * *

